

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER OF THE PETITION OF  
BONNEVILLE POWER ADMINISTRATION  
FOR DECLARATORY ORDER  
DISCLAIMING JURISDICTION

UTILITY DIVISION  
PUBLIC SERVICE  
COMMISSION

Docket No. \_\_\_\_\_

**PETITION OF BONNEVILLE POWER ADMINISTRATION FOR  
DECLARATORY ORDER DISCLAIMING JURISDICTION**

**PETITIONER**

The Petitioner is Bonneville Power Administration ("BPA"). BPA is a federal power marketing administration within the U.S. Department of Energy that markets wholesale electrical power and operates transmission facilities in the Pacific Northwest.

**Petitioner:**

Robb F. Roberts  
Bonneville Power Administration  
Office of General Counsel  
Routing LC-7  
905 Northeast 11th Avenue  
P.O. Box 3621  
Portland, Oregon 97232  
Telephone: (503) 230-4201  
Facsimile: (503) 230-7405  
Email: rfroberts@bpa.gov

**Petitioner's representatives:**

Thomas E. Smith  
Moulton, Bellingham, Longo  
& Mather, P.C.  
Crowne Plaza, Suite 1900  
27 North 27<sup>th</sup> Street  
P. O. Box 2559  
Billings, Montana 59103-2559  
Telephone: (406) 248-7731  
Facsimile: (406) 248-7889  
Email: [smith@moultonlawfirm.com](mailto:smith@moultonlawfirm.com)

**STATEMENT OF FACTS**

1. The proposed financing would be of various, as of yet undetermined, transmission facilities including system replacements, upgrades,

and additions to be put into service over time, and primarily affecting existing transmission infrastructure ranging from 69 kV to 1000 kV (the "Facilities"). Some of the Facilities will be located in Montana and all of the Facilities will be used exclusively by BPA to provide interstate transmission service and will not be available for use for bundled retail service.

2. The Facilities will be financed by a special purpose entity owner lessor (the "Owner Lessor") and acquired, constructed and/or installed by BPA pursuant to a construction agency agreement between the Owner Lessor and BPA.

3. The Facilities will be constructed, installed and/or acquired for the purposes of enhancing Northwest transmission grid ("Grid") reliability, ensuring compliance with mandatory reliability standards, enabling the integration of new generation into the Grid and managing Grid congestion.

4. While the Facilities will not be in support of distribution service, it is possible that certain facilities lower than 69 kV may be financed in cases of voltage step-ups of generation and station service to generating stations.

5. The Facilities will be constructed or installed on real property or real property easements or similar rights held by BPA on land that is owned by a variety of parties, both private and governmental.

6. The Facilities will be owned by the Owner Lessor, special purpose entity Northwest Infrastructure Financing Corporation II, a Delaware corporation which will be formed expressly for the purpose of arranging for the acquisition and financing of the Facilities.

7. All of the capital stock of the Owner Lessor will be owned by JH Holdings, not individually but acting solely in its capacity as trustee under a trust agreement between J.H. Management Corporation, a Massachusetts corporation ("JHM"), as grantor, and JH Holdings Corporation, a Massachusetts corporation ("JHH"), as trustee. All of the capital stock of JHM and JHH will be owned by The 1960 Trust, an independent charitable support organization qualified under Section 501(c)(3) of the Internal Revenue Code and operated for the benefit of Harvard University.

8. The Owner Lessor will not engage in any business other than arranging for the acquisition and financing of the Facilities.

9. The Owner Lessor will initially finance the acquisition and construction of the Facilities through one or more bank loans. The Owner Lessor's sole source of funds to repay the loans will be payments made by BPA under the lease of the Facilities to BPA.

10. The Owner Lessor and BPA will execute a master lease that will govern and incorporate from time to time separate individual lease commitments between BPA and the Owner Lessor for related Facilities (collectively, the "Lease"). Under the Lease, the Owner Lessor will lease its undivided interest in each of the Facilities to BPA at the time each such Facility is acquired, installed and/or constructed. Pursuant to the Lease, BPA will acquire a leasehold interest in and possession of the Facilities from the Owner Lessor; the term of the Lease will be seven (7) years from the date that the master lease and the first lease commitment are executed.

11. BPA will agree in the Lease to operate and maintain the Facilities in the same manner as it operates and maintains its other transmission facilities. To this end, the Owner Lessor will have no operating responsibilities or control rights with respect to the Facilities under the Lease or any other agreement. Moreover, the Lease will not impede the ability of BPA to transfer operational control over the Facilities to a regional transmission organization.

12. The final Lease will be substantially in the form of the draft Lease attached hereto as Exhibit A.

13. During the term of the Lease, the Owner Lessor will have a mere passive interest in the Facilities. Although the Owner Lessor will own the legal title to the Facilities and remain a passive owner, BPA will have dominion and control over the Facilities during the Lease term. Additionally, the Owner Lessor and/or its affiliates will not be in the business of producing, selling or transmitting electric power, either from the Facilities or otherwise.

14. At the conclusion of the Lease, BPA may (a) purchase each Facility for \$10.00, (b) renew the Lease for a term of one year for a nominal annual rental payment or (c) remove the Facilities at its own expense, or (d) execute a new lease if and to the extent the Owners Lessor assigns the Lease to another passive owner. Upon the expiration of the Lease term, the Owner Lessor would not reacquire possession of the Facilities; rather, the Owner Lessor would have its interests in the Facilities terminated in the event BPA purchases or removes the Facilities, would merely retain its passive interest in the event BPA renews the Lease, or would assign its interests to another passive owner.

## **QUESTION PRESENTED**

The question presented for declaratory ruling by the Montana Public Service Commission ("Commission") is whether the Owner Lessor is exempt from Commission regulation as a public utility under MCA § 69-3-111.

## **ARGUMENT AND DISCUSSION**

First, the Commission should issue a declaratory ruling disclaiming jurisdiction over the Owner Lessor under Section 69-3-101 because, under federal law, the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over the unbundled transmission of electric energy in interstate commerce. Section 201 of the Federal Power Act, 16 U.S.C. § 824, as amended ("FPA"), states that FERC has exclusive jurisdiction over the unbundled transmission of electric energy in interstate commerce:

(b) Use or sale of electric energy in interstate commerce.

**(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce** and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. **The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy**, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter. (Emphasis added.)

Because the Facilities will be used by BPA to provide interstate transmission service and will not be available for use for bundled retail service, under FPA § 201 FERC has exclusive jurisdiction over such transmission and

therefore sole jurisdiction over the Facilities. The Commission should therefore disclaim jurisdiction over the Owner Lessor with respect to the Facilities.

Additionally, Petitioner requests a declaratory order that Sections 69-3-101; 69-3-102 and 69-3-111 of the Montana Code Annotated (2005) ("MCA") do not apply to the Owner Lessor. Section 69-3-102 provides that the Commission shall have jurisdiction to regulate all public utilities:

**69-3-102. Supervision and regulation of public utilities.** The commission is hereby invested with full power of supervision, regulation, and control of such public **utilities**, subject to the provisions of this chapter and to the exclusion of the jurisdiction, regulation, and control of such utilities by any municipality, town, or village.

Section 69-3-101 defines the term "public utility." In pertinent part, the Section states:

**69-3-101. Meaning of term "public utility".** (1) The term "public utility", within the meaning of this chapter, shall embrace every corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or **receivers** appointed by any court whatsoever, that now or hereafter may own, operate, or control any plant or equipment, any part of a plant or equipment . . . within the state for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations, private or municipal . . . power in any form or by any agency . . . . (2) The term "public utility" does not include . . . a person exempted from regulation as a public utility as provided in 69-3-111.

Finally, Section 69-3-111 sets out the various entities exempted from classification as "public utilities":

**69-3-111. Persons with interest in property leased or to be sold to public utility -- exemption.** (1) Upon application, the commission, by order, may determine that any person not otherwise a public utility is not a public utility subject to the jurisdiction, control or regulation of the commission under this title, solely because such person owns or controls any plant or equipment, any part of or undivided interest in a plant or equipment

or any water right described in 69-3-101 . . . the operation and use of which is vested by lease or other contract in a public utility or other lessee . . . .

Petitioner contends that, under the statutory provisions set out above, the Owner Lessor is exempt from the definition of public utility and therefore not subject to the jurisdiction of the Commission because its lease arrangement with BPA places it squarely within the exemptions described in § 63-9-111. That section specifically states that any entity that is not otherwise a public utility is not a public utility under § 63-9-101 “solely because such person owns or controls any plant or equipment . . . the operation and use of which is vested by lease or other contract in a public utility or other lessee . . . .”

As explained above, though under the proposed lease financing the Owner Lessor will actually own the Facilities, the Owner Lessor is required under its articles of incorporation to lease the Facilities to BPA. Under the Lease, the Owner Lessor will lease its undivided interest in each of the Facilities to BPA at the time the Facility is acquired, installed and/or constructed. BPA will agree in the Lease to operate and maintain the Facilities in the same manner as it operates and maintains its other transmission facilities. To this end, the Owner Lessor will have no operating responsibilities or control rights with respect to the Facilities under the Lease or any other agreement.

Because the relevant statutes provide an exemption from the definition of “public utility” for owners of utility facilities who vest the operation and control of those facilities to another party, and because the Owner Lessor will, via the terms of the Lease, vest the operation and control of the Facilities in BPA, the Owner

Lessor is not a public utility and not subject to Commission regulation as a public utility under Montana law.<sup>1</sup>

Moreover, on February 14, 2007, BPA filed with FERC a petition requesting FERC to issue a declaratory order disclaiming jurisdiction over the Owner Lessor with respect to the Lease and Facilities. On March 23, 2007, FERC issued a favorable order with respect to the Lease and the Facilities and disclaimed jurisdiction over the Owner Lessor. *U.S. Dept. of Energy, Bonneville Power Admin.*, Order Granting Petition for Declaratory Order Disclaiming Jurisdiction, 118 FERC ¶ 61,240 (2007) (attached as Exhibit B). FERC's Order confirms the passive Owner Lessor is not a public utility under the Federal Power Act because it would be a solely passive investor in the power projects and would have no control over the operation of the proposed facilities. *Id.*

Additionally, the Washington Utilities and Transportation Commission ("WUTC") disclaimed jurisdiction over a nearly identical transaction involving BPA in 2004. In that case, the WUTC issued an Order declaring that the owner lessor and indenture trustee of an electric transmission line to be operated by BPA would not be public service companies under Washington law and consequently would not be subject to WUTC regulation. *In the Matter of the Petition of the Bonneville Power Administration for a Declaratory Order Disclaiming Jurisdiction*, Docket No. UE-040088, Order No. 01, p. 1 (Feb. 20, 2004). Given the similarity of the instant facts to those established in the 2004 WUTC case, as well as the

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<sup>1</sup> The Commission issued a Declaratory Ruling under similar circumstances in *In the Matter of the Application of the Montana Power Company for Authority to Issue Securities, Approval of the Terms of a Leveraged Lease and for Exemption from Regulation for Certain Parties*, Order No.

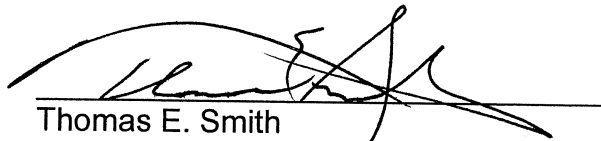


similarity of Washington's and Montana's classification and regulation of public utilities, the WUTC case provides additional support for a finding that the Owner Lessor is not a "public utility" under Montana law.

**REQUEST FOR DECLARATORY RULING**

Based on the foregoing, Petitioner requests a declaratory ruling that the Owner Lessor in a proposed lease financing is exempt from the definition of "public utility" under Montana Code § 69-3-101 and therefore not subject to Commission jurisdiction under Montana Code § 69-3-102.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of March, 2007.



Thomas E. Smith  
Moulton, Bellingham, Longo  
& Mather, P.C.  
Crowne Plaza, Suite 1900  
27 North 27<sup>th</sup> Street  
P. O. Box 2559  
Billings, Montana 59103-2559  
Telephone: (406) 248-7731  
Facsimile: (406) 248-7889  
Email: [smith@moultonlawfirm.com](mailto:smith@moultonlawfirm.com)

*Attorneys for Bonneville Power  
Administration*

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5168, Docket No. 85.11.45 (Nov. 27, 1985) ("MPC"). The Commission ruled in MPC that passive owner investors in a leveraged lease transaction were not public utilities pursuant to § 69-3-111.

**EXHIBIT A**

**Lease**

## MASTER LEASE AGREEMENT

THIS MASTER LEASE AGREEMENT, made and entered into as of [ ] 1, 2007 (the "Lease" or "Lease Agreement" or "this Agreement"), by and between the Northwest Infrastructure Financing Corporation II (the "Lessor"), a Delaware corporation and the United States of America Department of Energy acting by and through the Administrator of the Bonneville Power Administration (the "Lessee") (capitalized terms used but not defined in the recitals to this Lease Agreement shall have the respective meanings assigned such terms in Section 1.1 hereof):

### WITNESSETH

WHEREAS the Lessor is authorized to own, construct and lease transmission and distribution facilities; and

WHEREAS prior to the execution and delivery of a Schedule hereto, the Lessee shall have determined that the Project (as defined herein) described in such Schedule is needed to maintain reliable and adequate electrical service to the Lessee's customers; and

WHEREAS the Lessee desires to lease each Project from the Lessor to provide service to the Lessee's customers; and

WHEREAS the Lessee is authorized pursuant to law to construct, operate, lease and lease-purchase transmission facilities, to provide transmission and other services and to enter into agreements to carry out such authority:

NOW, THEREFORE, in consideration of the premises and the respective representations, covenants and agreements hereinafter contained, the parties hereto do mutually promise, covenant and agree as follows:

### ARTICLE I

#### DEFINITIONS AND REPRESENTATIONS

Section 1.1 Definitions. Terms not otherwise defined herein shall have the same meanings as used in Appendix B attached hereto.

Section 1.2 Construction. In this Agreement, unless the context otherwise requires:

(a) The terms "hereby", "hereof", "hereto", "herein", "hereunder" and any similar terms, as used in this Agreement, refer to this Agreement (including all Schedules hereto), and the term "hereafter" mean after, and the term "heretofore" means before, the date of the execution and delivery of this Agreement.

(b) Words of the masculine gender mean and include correlative words of the feminine and neuter genders and words importing the singular number shall mean and include the plural number and vice versa.

(c) Words importing persons include firms, associations, partnerships (including limited partnerships), trusts, corporations and other legal entities, including public bodies, as well as natural persons.

(d) Any headings preceding the texts of the several Articles and Sections of this Lease Agreement, and any table of contents appended to copies hereof, shall be solely for convenience of reference and shall not constitute a part of this Lease Agreement, nor shall they affect its meaning, construction or effect.

(e) All accounting terms not otherwise defined herein shall have the meanings in accordance with generally accepted accounting principles.

(f) Reference herein to an Article number (e.g., Article 4) or a Section number (e.g., Section 6.2) shall be construed to be a reference to the designated Article number or Section number hereof unless the context or use clearly indicates another or different meaning or intent.

Section 1.3 Representations and Warranties by Lessor. The Lessor makes the following representations and warranties as of the date of execution and delivery of this Agreement and of each Schedule hereto:

(a) The Lessor is duly organized and existing under the laws of the State of Delaware, and it is authorized and empowered to enter into the transactions contemplated by this Agreement and to carry out its obligations hereunder.

(b) This Agreement constitutes the legal, valid and binding obligation of the Lessor enforceable against the Lessor in accordance with its terms, except to the extent that the enforceability of this agreement may be limited by bankruptcy, moratorium or insolvency or other laws affecting creditors' rights generally and subject to general rules of equity (regardless of whether such enforceability is considered in an action at law or a proceeding in equity).

(c) There is no action, suit or proceeding before or pending or, to the best knowledge of the Lessor, threatened against the Lessor, by or before any court, public board, public body, administrative agency or arbitration board wherein an unfavorable decision, ruling or finding would adversely affect the transactions contemplated hereby, or which, in any way, would adversely affect the validity of this Lease Agreement, or any agreement or instrument to which the Lessor is a party and that is used or contemplated for use in consummation of the transactions contemplated hereby.

(d) The execution, delivery and performance of this Agreement and the consummation of the transactions herein contemplated have been duly authorized by all requisite action on the part of the Lessor and will not violate or conflict with any provision of law or any order of any court or agency of government or any indenture, agreement or other instrument to which the Lessor is a party or by which it or any of its property is subject to or bound, or be in conflict with or result in a breach of or constitute (with due notice and/or lapse of time) a default under any such indenture, agreement or other instrument or result in the imposition of any Lien, of any nature whatsoever other than Permitted Encumbrances.

(e) All consents, approvals or authorizations, if any, of any governmental authority required on the part of the Lessor in connection with the execution and delivery of this Agreement have been duly obtained.

Section 1.4 Representations and Warranties by Lessee. The Lessee makes the following representations and warranties as of the date of execution and delivery of this Agreement and of each Schedule hereto:

(a) This Agreement constitutes the legal, valid and binding obligation of the Lessee enforceable against the Lessee in accordance with its terms, except to the extent that the enforceability of this Agreement is qualified by (a) limitations imposed by bankruptcy laws of the United States or insolvency, reorganization, arrangement, moratorium or other laws relating to or affecting the enforcement of creditors' rights generally (under existing law the Lessee may not be a debtor in a case commenced under the United States Bankruptcy Code), (b) general principles of equity, regardless of whether such enforceability is considered in a proceeding in equity or at law, (c) the exercise of judicial discretion in appropriate cases and (d) the limitations on legal remedies against the United States under federal law.

(b) There is no action, suit or proceeding pending or to the knowledge of the Lessee threatened against the Lessee by or before any court, public board, public body, administrative agency or arbitration board that would materially adversely affect the ability of the Lessee to perform its obligations under this Agreement and all authorizations, consents and approvals of governmental bodies or agencies required to be obtained by the Lessee as of the date hereof in connection with the execution and delivery of this Agreement or in connection with the performance of the obligations of the Lessee hereunder have been obtained.

(c) The execution, delivery and performance of this Agreement and the consummation of the transactions herein contemplated have been duly authorized by all requisite action on the part of the Lessee and will not violate or conflict with any provision of law or any order of any court or agency of government or any indenture, agreement or other instrument to which the Lessee is a party or by which it or any of its property is subject to or bound, or be in conflict with or result in a breach of or constitute (with due notice and/or lapse of time) a default under any such indenture, agreement or other instrument or result in the imposition of any Lien of any nature whatsoever other than Permitted Encumbrances.

(d) All consents, approvals or authorizations, if any, of any governmental authority required on the part of the Lessee in connection with the execution and delivery of this Agreement have been duly obtained.

(e) No Event of Default, and no event that with the giving of notice or the passage of time, or both, would constitute an Event of Default, has occurred and is continuing.

## ARTICLE II

### LEASE OF PROJECT AND RENTAL PROVISIONS

Section 2.1 Lease of each Project. (a) The Lessor shall have all legal rights of title and ownership of each Project. As of the effective date set forth in the applicable Schedule, the

Lessor leases to the Lessee and the Lessee hereby leases from the Lessor, each Project, for and during the term herein provided and upon and subject to the terms and conditions herein set forth. The Lessor hereby delivers to the Lessee and the Lessee hereby accepts sole and exclusive possession of each Project as of the effective date set forth in the applicable Schedule. A good and valid leasehold interest to all materials, equipment, machinery and other property intended to be incorporated or installed as part of each Project shall vest in the Lessee immediately upon delivery to or installation or payment by the Lessor for such property, whichever shall occur first.

(b) The Lessee agrees that the right to use easements granted by the Lessee to the Lessor pursuant to the Construction Agency Agreement shall not expire until the termination of this Agreement.

(c) The Lessor covenants and agrees not to sell, convey, transfer, lease, mortgage or encumber any Project or any part thereof except as specifically permitted under this Agreement.

Section 2.2 Duration of Term. The term of this Agreement shall commence on [\_\_\_\_], 2007 and shall, subject to extension pursuant to Section 7.1(c), expire on [\_\_\_\_, 2014] or such earlier date as all Projects have been purchased by the Lessee in accordance with Section 7.1(a) or 7.1(b).

Section 2.3 Rental Provisions, Pledge of Agreement and Rent. (a) The Lessee covenants to make rental payments in the amounts and at the times set forth on the Schedules attached hereto. The Lessor agrees that such rental payments shall be paid by the Lessee directly to the Custodian for deposit in the Loan Fund.

(b) The Lessee shall pay, as additional rent hereunder, all Impositions, as defined in and in accordance with the provisions of Section 3.6 hereof. If the Lessee fails to pay any Imposition except as permitted by Section 3.6, the Lessor may make such payment and the Lessee shall reimburse the Lessor therefor in accordance with paragraph (c).

(c) In the event the Lessee should fail to make or cause to be made any of the payments required under the foregoing provisions of this Section, the item or installment not so paid shall continue as an obligation of the Lessee until the amount not so paid shall have been fully paid. Upon the occurrence and continuance of any Event of Default hereunder, each rental payment shall be increased by the percentage specified in the applicable Schedule.

(d) The Lessee shall have the option to prepay its rental obligation and to exercise its option to purchase all or any portion of any Project designated by the Lessee, in whole or in part, at the times and in the manner provided in Article 7 hereof.

(e) It is agreed by the parties hereto that any amounts remaining in the Loan Fund or the Reserve Fund upon expiration or earlier termination of the Lease Term, as provided in this Agreement, shall belong to and be paid to the Lessee by the Lessor (or the Lessor shall cause the Custodian to pay the same to the Lessee) as overpayment of rent. Furthermore, it is agreed by the Lessor that any amounts that the Lessor elects to transfer to and/or deposit into the Reserve

Fund shall be credited by the Lessor against the next payments of the Lessee due under Section 2.3(a) hereof.

Section 2.4 Obligation of Lessee. The obligation of the Lessee to pay the rent and all other payments provided for in this Agreement and to maintain each Project in accordance with Section 3.3 of this Agreement shall be absolute and unconditional, irrespective of any defense or any rights of set-off, recoupment or counterclaim or deduction and without any rights of suspension, deferment, diminution or reduction it might otherwise have against the Lessor, and the obligation of the Lessee shall arise whether or not such Project has been completed as provided in this Agreement or is operating or operable or its use is curtailed, suspended or terminated. The Lessee's obligations hereunder shall be payable solely from the Bonneville Fund and such obligations are not, nor shall they be construed to be, general obligations of the United States, nor are such obligations intended to be or are they secured by the full faith and credit of the United States.

### ARTICLE III

#### CONSTRUCTION, OPERATION, MAINTENANCE, IMPOSITIONS, LEGAL REQUIREMENTS

Section 3.1 Construction and Completion of the Projects. The Lessee acknowledges that the Lessor is undertaking to construct each Project pursuant to the Construction Agency Agreement and that the Lessee will be leasing each Project as it is being constructed. The Lessor agrees that it will suspend, delay or terminate construction of any Project at the direction of the Lessee and will not suspend, delay or terminate construction of any Project other than at the direction of the Lessee. The Lessee may, at its option, but shall have no obligation to, construct or complete any Project as Lessee under this Lease Agreement.

Section 3.2 Operation of each Project. (a) The Lessor shall have no control over, and no obligation with respect to, any Project, including the operation, maintenance, repair, replacement or use of such Project. The purpose of the Lessor is to acquire, construct and equip each Project, lease each Project to the Lessee pursuant to this Lease Agreement, finance each Project through advances made under the Credit Agreement and take related actions. The Lessor shall not amend its purposes as set forth in its articles of incorporation and by-laws on the date of execution and delivery of this Agreement or engage in any activities or incur any obligations unrelated to such purposes.

(b) The Lessee will pay all costs of operating each Project and will make all decisions regarding the operation of each Project. The Lessee may, in its discretion, transfer operational control to a regional transmission organization or other entity; provided that the Lessee shall remain liable hereunder. The Lessee may suspend or terminate operation of any Project in its discretion, provided that this Agreement shall remain valid, binding and enforceable against the Lessee and there shall be no abatement, postponement or reduction in the rent or other amounts payable by the Lessee under this Agreement.

Section 3.3 Maintenance, Alterations and Improvements. (a) During the term of this Agreement, the Lessee will pay all costs of maintaining each Project and will maintain each

Project in the same manner in which the Lessee maintains similar facilities that it owns. The Lessee may install any replacements, renewals and repairs to any Project that it deems necessary or desirable (whether ordinary or extraordinary, structural or nonstructural, foreseen or unforeseen). The Lessor shall be under no obligation to replace, service, test, adjust, erect, maintain or effect replacements, renewals or repairs of any Project, to effect the replacement of any inadequate, obsolete, worn-out or unsuitable parts of any Project, or to furnish any services for any Project and the Lessee hereby agrees to assume full responsibility therefor.

(b) The Lessee may make such alterations of or additions to each Project or any part thereof from time to time as it in its discretion may determine to be desirable for its uses and purposes.

(c) The Lessee may install or permit to be installed, machinery, equipment and other personal property on each Project and any such property shall not become part of such Project unless the description of such Project is amended pursuant to Section 3.5.

(d) Except as otherwise provided in Section 5.3 hereof, unless the Lessor shall consent thereto in writing, the Lessee shall not create, permit or suffer to exist any Lien against any Project or any part thereof, or the interest of the Lessee in any Project or this Agreement except for Permitted Encumbrances.

Section 3.4 Removal of Property of each Project. (a) The Lessee shall have the privilege from time to time of removing from each Project any fixture or any item of personal property provided that this Agreement shall remain valid, binding and enforceable following such removal. The Lessee shall deposit in the Loan Fund (as a prepayment of the rent payment then coming due) any amounts received by it from the sale of such removed property that are not used by it to purchase replacement property that is installed as part of such Project.

(b) The removal from any Project of any property shall not entitle the Lessee to any abatement or reduction in the rentals and other amounts payable by the Lessee under this Agreement.

Section 3.5 Amendment of the Projects. The Lessor agrees that, at the request of the Lessee, it will amend the definition of a Project as described in any Schedule hereto to (i) change the location of such Project or (ii) to remove any part of the Project or (iii) to replace all or any part of such Project with a substantially similar Project or part; provided that this Agreement shall remain valid, binding and enforceable following any such amendment.

Section 3.6 Taxes, Assessments and Governmental Charges. The Lessee shall pay when the same shall become due all taxes and assessments, general and specific, if any, levied and assessed upon or against each Project, this Agreement, any estate or interest of the Lessor or the Lessee in any Project or transfer of such estate or interest, or the rentals hereunder during the term of this Agreement, and all assessments and other governmental charges and impositions whatsoever, foreseen or unforeseen, ordinary or extraordinary, under any present or future law, and charges for public or private utilities or other charges incurred in the occupancy, use, operation, maintenance or upkeep of each Project, all of which are herein called "Impositions". The Lessor shall promptly forward to the Lessee any notice, bill or other statement received by



the Lessor concerning any Imposition. The Lessee may pay any Imposition in installments if so payable by law, whether or not interest accrues on the unpaid balance. The Lessee may contest in good faith the validity, existence or applicability of any Imposition. Notwithstanding anything herein to the contrary, the Lessee may withhold payment of such Imposition during such contest so long as the failure to pay such Imposition does not adversely affect the validity and enforceability of this Agreement or the other obligations of the Lessee hereunder.

Section 3.7 Compliance with Law. The Lessee agrees that it will, throughout the term of this Agreement and at its sole cost and expense, operate and maintain each Project in compliance, in all material respects, with all Federal, state and local statutes, codes, laws, acts, ordinances, orders, judgments, decrees, rules, regulations and authorizations, whether foreseen or unforeseen, ordinary or extraordinary, which shall now or at any time hereafter be binding upon or applicable to such Project or the Lessee's operation and maintenance of such Project or any portion thereof (including without limitation those relating to zoning, land use, environmental protection, air, water and land pollution, toxic wastes, hazardous wastes, solid wastes, wetlands, health, safety, equal opportunity, minimum wages, and employment practices) (the "Legal Requirements"), and will observe and comply with all conditions, requirements, and schedules necessary to preserve and extend all rights, licenses, permits (including, without limitation, zoning variances, special exception and non-conforming uses), privileges, franchises and concessions in connection with the operation and maintenance of such Project or any portion thereof. The Lessee may in good faith contest the validity or applicability of any Legal Requirement. Notwithstanding anything herein to the contrary, the Lessee may withhold compliance with such Legal Requirement during such contest so long as such noncompliance does not adversely affect the validity and enforceability of this Agreement or the other obligations of the Lessee hereunder.

#### ARTICLE IV

##### DAMAGE, DESTRUCTION AND CONDEMNATION

###### Section 4.1 Damage, Destruction and Condemnation.

(a) In the event that at any time during the term of this Agreement the whole or part of any Project shall be damaged or destroyed, or taken or condemned by a competent authority for any public use or purpose, or by agreement between the Lessor and those authorized to exercise such right, or if the temporary use of any Project shall be so taken by condemnation or agreement (a "Loss Event"):

- (i) the Lessor shall have no obligation to rebuild, replace, repair or restore such Project,
- (ii) there shall be no abatement, postponement or reduction in the rent or other amounts payable by the Lessee under this Agreement, and
- (iii) the Lessee will promptly give written notice to the Lessor of any Loss Event of greater than \$1,000,000 or any Loss Event that will temporarily or permanently

result in a loss of use of such Project, which notice shall generally describe the nature and extent of such Loss Event.

(b) The Lessee shall not be obligated to repair or replace any Project or purchase any Project following a Loss Event so long as this Agreement shall remain valid, binding and enforceable on the Lessee following such Loss Event. If the Lessee elects to repair or replace any Project following a Loss Event, it shall do so with its own funds except to the extent amounts are available for such purpose in the Project Fund, in which case the Lessee may use such funds.

(c) All proceeds of insurance or condemnation awards or recoveries of claims against contractors (or an amount equal to such proceeds, awards or recoveries) received by the Lessor or the Lessee shall be deposited into the Project Fund, the Loan Fund or the Reserve Fund, as agreed to by the Lessor and the Lessee.

## ARTICLE V

### PARTICULAR COVENANTS

Section 5.1 Expenses; Indemnity. (a) The Lessee shall pay or reimburse the Lessor for all reasonable costs and expenses of the Lessor incurred in connection with this Agreement.

(b) The Lessee shall at all times protect, indemnify and hold the Lessor, its directors, officers, incorporators, stockholders, and any person(s) controlled by or controlling the Lessor ("Lessor Indemnified Parties") harmless of, from and against

- (i) all costs and expenses arising from or relating to compliance with environmental laws and regulations and orders of governmental agencies applicable to each Project or arising from or relating to mitigation, remediation, or abatement of environmental impacts,
- (ii) any and all claims (whether in tort, contract or otherwise), demands, expenses (including reasonable attorneys fees) and liabilities for any loss, damage, injury and liability of every kind and nature and however caused, including any liability arising from failure to comply with applicable environmental laws, regulations or orders applicable to each Project, and taxes of any kind and by whomsoever imposed on the Lessor in respect of each Project,

in each case arising from or relating to such Project or resulting from, arising out of, or in any way connected with the financing of the costs of such Project; provided, however, that the Lessee shall have no indemnification obligation under this Section 5.1(b) for any such costs, expenses, claims, demands, taxes or liabilities arising from the intentional misrepresentation or willful misconduct of the Lessor or the Lessor Indemnified Parties. The indemnification set forth in this Section 5.1(b) shall be binding upon the Lessee for any and all claims, demands,

expenses, liabilities and taxes set forth herein and shall survive the expiration or termination of this Agreement.

Section 5.2 Financial Statements; No-Default Certificates. (a) The Lessee agrees to furnish to the Lessor, as soon as available and in any event within one-hundred eighty (180) days after the close of each Fiscal Year of the Lessee, a copy of the annual audited financial statements of the Lessee and the related statements of income, earnings, retained earnings and changes in financial position for such Fiscal Year, prepared in accordance with generally accepted accounting principles, accompanied by an opinion of an independent certified public accountant.

(b) The Lessee shall immediately notify the Lessor of the occurrence of any Event of Default of which it has knowledge. Any notice required to be given pursuant to this subsection shall be signed by an Authorized Representative of the Lessee and set forth a description of the default and the steps, if any, being taken to cure said default. If no steps have been taken, the Lessee shall state this fact on the notice.

Section 5.3 Discharge of Liens. (a) Except as permitted by Sections 3.2 and 8.2 hereof, the Lessee shall not sell, assign, encumber (other than Permitted Encumbrances), convey or otherwise dispose of its leasehold interest in any Project or any part thereof during the term of this Agreement, without the prior written consent of the Lessor, and any purported disposition without such consent shall be void; if any lien, encumbrance or charge is filed or asserted, or any judgment, decree, order, levy or process of any court or governmental body is entered, made or issued or any claim (such liens, encumbrances, charges, judgments, decrees, orders, levies, processes and claims being herein collectively called "Liens"), whether or not valid, is made against any Project or any part thereof or the interest therein of the Lessor, the Lessee or against any of the rentals or other amounts payable under this Agreement or the interest of the Lessee under this Agreement other than Liens for Impositions and Permitted Encumbrances, the Lessee forthwith upon receipt of notice of the filing, assertion, entry or issuance of such Lien (regardless of the source of such notice) shall give written notice thereof to the Lessor and take all action (including the payment of money and/or the securing of a bond) at its own cost and expense (unless such Liens resulted solely from the willful misconduct or intentional misrepresentation of the Lessor) as may be necessary or appropriate to obtain the discharge in full thereof and to remove or nullify the basis therefor. Nothing contained in this Agreement shall be construed as constituting the express or implied consent to or permission of the Lessor for the performance of any labor or services or the furnishing of any materials that would give rise to any Lien against the Lessor's interest in each Project.

(b) Notwithstanding the preceding paragraph, the Lessee shall not be required to discharge any Lien against the interest of the Lessee in a Project as long as this Agreement will remain valid, binding and enforceable. Nothing herein shall be construed as limiting the right of the Lessee to sell the transmission capability of each Project, to use or sell transmission services or capacity derived from each Project, to permit operational control of each Project by a regional transmission organization or other entity in accordance with Section 3.2(b), to make each Project available for use by third parties (provided that if such use is pursuant to an assignment or sublease, the provisions of Section 8.2 must be complied with), or to permit interconnections to be made with each Project.

Section 5.4 Lessor's Authority; Covenant of Quiet Enjoyment. The Lessor covenants and agrees that it has full right and lawful authority to enter into this Agreement for the full term hereof. So long as the Lessee shall pay the rent and all other sums payable by it under this Agreement and shall duly observe all the covenants, stipulations and agreements herein contained obligatory upon it and no Event of Default hereunder shall have occurred and be continuing, the Lessee shall have, hold and enjoy, during the term hereof, peaceful, quiet and undisputed possession of each Project, and the Lessor (at the sole cost and expense of the Lessee) shall from time to time take all necessary action to that end, subject to Permitted Encumbrances.

Section 5.5 No Warranty of Condition or Suitability. THE LESSOR HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATION OR WARRANTY WHATSOEVER, EITHER EXPRESS OR IMPLIED, WITH RESPECT TO THE MERCHANTABILITY, CONDITION, FITNESS, DESIGN, OPERATION OR WORKMANSHIP OF ANY PART OF A PROJECT, ITS FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OR CAPACITY OF THE MATERIALS IN EACH PROJECT, OR THE SUITABILITY OF EACH PROJECT FOR THE PURPOSES OR NEEDS OF THE LESSEE OR THE EXTENT TO WHICH ADVANCES MADE PURSUANT TO THE CREDIT AGREEMENT WILL BE SUFFICIENT TO PAY THE COST OF EACH PROJECT. THE LESSEE IS SATISFIED THAT EACH PROJECT IS SUITABLE AND FIT FOR ITS PURPOSES. THE LESSOR SHALL NOT BE LIABLE IN ANY MANNER WHATSOEVER TO THE LESSEE OR ANY OTHER PERSON FOR ANY LOSS, DAMAGE OR EXPENSE OF ANY KIND OR NATURE CAUSED, DIRECTLY OR INDIRECTLY, BY THE PROPERTY OF ANY PROJECT OR THE USE OR MAINTENANCE THEREOF OR THE FAILURE OF OPERATION THEREOF, OR THE REPAIR, SERVICE OR ADJUSTMENT THEREOF, OR BY ANY DELAY OR FAILURE TO PROVIDE ANY SUCH MAINTENANCE, REPAIRS, SERVICE OR ADJUSTMENT, OR BY ANY INTERRUPTION OF SERVICE OR LOSS OF USE THEREOF OR FOR ANY LOSS OF BUSINESS HOWSOEVER CAUSED.

Section 5.6 Further Assurances. The Lessee will do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered such further acts, instruments, conveyances, transfers and assurances, including Uniform Commercial Code financing statements, at the sole cost and expense of the Lessee, as the Lessor deems reasonably necessary or advisable for the implementation, effectuation, correction, confirmation or perfection of this Agreement.

Section 5.7 Recording and Filing. This Agreement as originally executed or a memorandum thereof may, but shall not be required to be, recorded by the Lessee in such office or offices as may at the time be provided by law as the proper place for the recordation hereof.

Section 5.8 Right to Cure Lessor Defaults. The Lessor hereby grants the Lessee full authority for account of the Lessor to perform any covenant or obligation the nonperformance of which is alleged to constitute a default by the Lessor in any notice received by the Lessee, in the name and stead of the Lessor, with full power of substitution. The Lessor agrees to reimburse the Lessee for all costs and expenses incurred by the Lessee in performing any such covenant or obligation.

Section 5.9 Federal and State Tax Treatment and Filing. The Lessor shall file all Federal and state income tax returns required to be filed by it and makes an irrevocable election not to claim depreciation on any Project for Federal income tax purposes and to file Federal income tax returns that forgo all income and deduction items with respect to each Project that are available to owners of property.

## ARTICLE VI

### EVENTS OF DEFAULT; REMEDIES

Section 6.1 Events of Default. Any one or more of the following events shall constitute an "Event of Default" hereunder:

(a) Failure of the Lessee to pay any rental payment that has become due and payable by the terms of Section 2.3(a) or 2.3(c) hereof;

(b) Failure of the Lessee to pay any amount due hereunder (other than under Section 2.3(a) hereof) and continuance of such failure for thirty (30) days after notice of such failure is given to the Lessee by the Lessor;

(c) Failure of the Lessee to observe and perform any covenant, condition or agreement hereunder on its part to be performed (except as described in Section 6.1(a) or (b) hereof) and (1) continuance of such failure for a period of thirty (30) days after receipt by the Lessee of written notice specifying the nature of such default from the Lessor or (2) if by reason of the nature of such default the same can be remedied, but not within the said thirty (30) days, the Lessee fails to proceed with reasonable diligence after receipt of said notice to cure the same or fails to continue with reasonable diligence its efforts to cure the same;

(d) Any representation or warranty by the Lessee contained herein shall be incorrect in any material respect on or as of the date when made;

(e) A Special BPA Event shall have occurred or the Lessee shall no longer be a power marketing agency or an instrumentality of the United States;

(f) Any judgment or order for the payment of money in excess of \$20,000,000 shall be rendered against the Lessee and such judgment or order shall remain unsatisfied for 30 consecutive days after it shall have been finally determined that such judgment or order shall be payable from the Bonneville Fund;

(g) The Lessee shall (i) generally not pay its Debts as such Debts become due; or (ii) admit in writing its inability to pay its Debts generally as they become due; or (iii) file a petition in bankruptcy or seeking a composition of indebtedness; or (iv) make an assignment for the benefit of its creditors; or (v) or any proceeding shall be instituted by or against the Lessee seeking to adjudicate it a bankrupt or insolvent, or seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency or reorganization or relief of debtors, or seeking the entry of an order for relief or the appointment of a receiver, trustee, custodian or other similar official for it or for any substantial part of its property and, in the case of any such proceeding

instituted against it (but not instituted by it), either such proceeding shall remain undismissed or unstayed for a period of 30 days, or any of the actions sought in such proceeding (including, without limitation, the entry of an order for relief against, or the appointment of a receiver, trustee, custodian or other similar official for, it or for any substantial part of its property) shall occur; or the Lessee shall take any corporate action to authorize any of the actions set forth above in this paragraph (g);

(h) The Lessee shall fail to pay any principal of or premium or interest on any Debt, when the same becomes due and payable (whether by scheduled maturity, required prepayment, acceleration, demand or otherwise), and such failure shall continue after the applicable grace period, if any, specified in the agreement or instrument relating to such Debt; or any other event shall occur or condition shall exist under any agreement or instrument relating to any such Debt and shall continue after the applicable grace period, if any, specified in such agreement or instrument, if the effect of such event or condition is to accelerate, or to permit the acceleration of, the maturity of such Debt; or any such Debt shall be declared to be due and payable, or required to be prepaid (other than by a regularly scheduled required prepayment), prior to the stated maturity thereof; or

(i) Any material provision of this Agreement shall at any time and for any reason cease to be valid and binding upon the Lessee, except pursuant to the terms hereof, or shall be declared to be null and void, or the validity or enforceability thereof shall be contested by the Lessee or any governmental authority or the Lessee shall deny that it has any further liability or obligation hereunder.

**Section 6.2 Remedies on Default.** Whenever any Event of Default shall have occurred and be continuing, the Lessor, subject to the next succeeding paragraph of this Section 6.2 and subject to Section 6.8 hereof, may take whatever action at law or in equity permitted by law to be taken against the Lessee as may appear necessary or desirable to collect the rent then due and thereafter to become due, or to enforce performance or observance of any obligations, agreements or covenants of the Lessee under this Agreement.

The Lessor, during the term of this Agreement, waives any and all rights as owner or as lessor of each Project to re-enter and take possession of such Project, to sublease such Project, to terminate this Agreement and to exclude the Lessee from possession of such Project upon the occurrence of an Event of Default under this Agreement. The Lessor and the Lessee hereby declare that this Agreement does not create a security interest in any Project in favor of the Lessor, and the Lessor hereby waives any rights it may have as a secured party with respect to each Project under the Uniform Commercial Code in effect in any jurisdiction or otherwise.

No action taken pursuant to this Section 6.2 or Section 6.3 shall, except as expressly provided herein, relieve the Lessee from the Lessee's obligations hereunder, all of which shall survive any such action.

**Section 6.3 Surrender of Project Upon Event of Default.** Subject to Section 6.8, upon the occurrence and continuance of an Event of Default under Section 6.1(a) hereof, the Lessee shall, at the direction of the Lessor, given in its sole discretion, promptly surrender use and possession of each Project to the Lessor or a designee of the Lessor.

Section 6.4 Remedies Cumulative. The rights and remedies of the Lessor under this Agreement shall be cumulative and shall not exclude any other rights and remedies of the Lessor allowed by law or in equity with respect to any default under this Agreement. Failure by the Lessor to insist upon the strict performance of any of the covenants and agreements herein set forth or to exercise any rights or remedies upon default by the Lessee hereunder shall not be considered or taken as a waiver or relinquishment for the future of the right to insist upon and, to the extent permitted by law, to enforce by mandatory injunction, specific performance or other appropriate legal remedy strict compliance by the Lessee with all of the covenants and conditions hereof, or of the rights to exercise any such rights or remedies, if such default by the Lessee be continued or repeated.

Section 6.5 No Additional Waiver Implied by One Waiver. In the event any covenant or agreement contained in this Agreement should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder. No waiver shall be binding unless it is in writing and signed by the party making such waiver. No course of dealing between the Lessor and the Lessee or any delay or omission on the part of the Lessor in exercising any rights hereunder shall operate as a waiver.

Section 6.6 Effect on Discontinuance of Proceedings. In case any proceeding taken by the Lessor on account of any Event of Default hereunder shall have been discontinued or abandoned for any reason or shall have been determined adversely to the Lessor, then, and in every such case, the Lessor and the Lessee shall be restored to their respective former positions and rights hereunder.

Section 6.7 Agreement to Pay Attorneys' Fees and Expenses. In the event the Lessee should default under any of the provisions of this Agreement, and the Lessor should employ attorneys and/or incur other expenses for the collection of rentals or other amounts payable hereunder or the enforcement of performance or observance of any obligation or agreement on the part of the Lessee herein contained, the Lessee agrees that it will on demand therefor pay to the Lessor the reasonable fees and disbursements of such attorneys and such other expenses so incurred.

Section 6.8 Statutory Limitation on Legal Remedies Against the Lessee. The Lessor acknowledges that its remedies against the Lessee are limited to those provided under Federal law, which provides that the exclusive remedy for breach of contract by the Lessee is a judgment for money damages. The parties agree that such damages shall be measured by the amounts required to be paid by the Lessee under this Agreement and not by the market value of a Project or a leasehold interest in a Project.

## ARTICLE VII

### OPTIONS

Section 7.1 Options. (a) The Lessee has the option, upon seven (7) day's notice to the Lessor, to make advance rental payments which, at the direction of the Lessee, shall be deposited into the Loan Fund and credited against future rental payments as directed by the Lessee. The

Lessee further has the option, upon seven (7) day's notice to the Lessor, to purchase all or any portion of any Project by making a purchase option payment equal to the amount necessary to enable the Lessor to prepay all or a portion of the loan incurred by the Lessor to acquire such Project or portion thereof (together with the payment by the Lessor of all other amounts owed to the lender and due upon such prepayment). The Lessee shall exercise its option to make such advance rental payments or such purchase option by delivering a written notice of an Authorized Representative of the Lessee to the Lessor, setting forth (i) the amount of the advance rental payment or purchase option payment and (ii) the date on which such payment is to be made. After any purchase of a portion of a Project, the rent payable pursuant to Section 2.3(a) for the Project shall be reduced by the percentage specified in the applicable Schedule or by such other amount as may be agreed to by the Lessor and the Lessee.

(b) The Lessor hereby grants the Lessee the option to purchase each and every Project at the end of the term of this Agreement for a purchase option payment equal to the amount necessary to enable the Lessor to prepay or pay all or a portion of the loan incurred by the Lessor to acquire such Project or portion thereof (together with the payment by the Lessor of all other amounts owed to the lender and due upon such prepayment) so long as no Event of Default hereunder has then occurred and is continuing. Such option may be exercised at any time during the term of this Agreement with respect to any or all Projects. The Lessee shall give the Lessor written notice of the exercise of such option at least sixty (60) days prior to the termination date of this Agreement.

(c) If the Lessee notifies the Lessor that it is not exercising its purchase option pursuant to Section 7.1(b) hereof with respect to a Project, then, at the option of the Lessor, this Agreement shall be extended for one year for \$10,000 for such year and the Lessee shall be obligated to remove such Project on behalf of the Lessor and deliver such Project to or at the direction of the Lessor prior to the end of the term of this Agreement with respect to such Project, as so extended. The cost of such removal and delivery shall be paid by the Lessee.

Section 7.2 Conveyance of Title. At the closing of any purchase of each Project or any component pursuant to Article VII hereof, the Lessor will upon receipt of the purchase price deliver to the Lessee good title to the property being purchased evidenced in writing by a bill of sale or other instrument of conveyance, as such property then exists, subject to the following: (i) those license and encumbrances (if any) to which said property was subject when conveyed to the Lessor; (ii) those Liens resulting from the failure of the Lessee to perform or observe any of the agreements on its part contained in this Agreement; and (iii) Permitted Encumbrances other than this Agreement.

## ARTICLE VIII

### MISCELLANEOUS

Section 8.1 Force Majeure. In case by reason of force majeure either party hereto shall be rendered unable wholly or in part to carry out its obligations under this Agreement, then except as otherwise expressly provided in this Agreement, if such party shall give notice and full particulars of such force majeure in writing to the other party within a reasonable time after occurrence of the event or cause relied on, the obligations of the party giving such notice (other



than the obligations of the Lessee to make payments required to be made hereunder), so far as they are affected by such force majeure, shall be suspended during the continuance of the inability then claimed which shall include a reasonable time for the removal of the effect thereof, but for no longer period, and such party shall endeavor to remove or overcome such inability with all reasonable dispatch. The term "force majeure," as employed herein, shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, orders of any kind of the Government of the United States or of the applicable state or any civil or military authority, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, hurricanes, storms, floods, washouts, droughts, arrest, restraining of government and people, civil disturbances, explosions, partial or entire failure of utilities, shortages of labor, material, supplies or transportation, or any other similar or different cause not reasonably within the control of the party claiming such inability. It is understood and agreed that the settlement of existing or impending strikes, lockouts or other industrial disturbances shall be entirely within the discretion of the party having the difficulty and that the above requirements that any force majeure shall be reasonably beyond the control of the party and shall be remedied with all reasonable dispatch shall be deemed to be fulfilled even though such existing or impending strikes, lockouts and other industrial disturbances may not be settled but could have been settled by acceding to the demands of the opposing person or persons.

Section 8.2 Assignment or Sublease by Lessee; Assignment by Lessor. (a) The Lessee may assign or transfer this Agreement or sublet the whole or any part of any Project so long as (1) the Lessee shall remain liable to the Lessor for the payment of all rent and other payments hereunder and for the full performance of all of the terms, covenants and conditions of this Agreement and (2) the Lessee shall deliver to the Lessor an Opinion of Counsel to the effect that such assignment, transfer or sublease will not legally impair in any respect the obligations of the Lessee for the payment of all rents nor for the full performance of all of the terms, covenants and conditions of this Agreement. The Lessee shall furnish or cause to be furnished to the Lessor a copy of any such assignment, transfer or sublease in substantially final form at least ten (10) days prior to the date of execution thereof. The Lessee may also enter into contracts relating to the use of a Project as provided in Sections 3.2(b) and 5.3(b).

(b) The Lessor has pledged and assigned to the lender as security for the obligations of the Lessor under the Credit Agreement all of the Lessor's right, title and interest in this Agreement (except for the Lessor's Reserved Rights), including all rental payments hereunder, and in furtherance of said pledge the Lessor has agreed to cause such rental payments to be paid to the Custodian for deposit in the Loan Fund. The Lessee hereby consents to the above-described lien and security interest, and pledge and assignment of this Agreement and agrees to make all rental payments and all payments under Article VII to the Custodian. The Lessor has also pledged and assigned to the lender as security for the obligations of the Lessor under the Credit Agreement all of the Lessor's right, title and interest in amounts held in the Project Fund, the Loan Fund and the Reserve Fund created and held under the Custodial Agreement. The Lessee hereby consents to the above-described lien and security interest and acknowledges that the Lessor's agreement pursuant to Section 2.3(e) is subject to such lien and the terms of the Custodial Agreement. The Lessee agrees to provide to the Lender a copy of each notice given by the Lessee to the Lessor pursuant to Sections 4.1(a)(iii), 5.2(b), 7.1(a), and 8.2(a) at the same time as such notice is given to the Lessor and the Lender shall be a third party beneficiary of the agreement of the Lessee contained in this sentence. The Lessee further

acknowledges that (i) the Lessor has agreed that it shall not consent to certain actions of the Lessee or shall not itself take certain actions under Sections 5.3, 7.1(a) or 8.3 without obtaining the prior consent of the Lender and (ii) the Lessor has agreed that the Lender may give the notice of default under Sections 6.1(b) or (c) on behalf of the Lessor.

Section 8.3 Amendments. This Agreement may be amended only by a written amendment signed by the parties hereto.

Section 8.4 Notices. All notices, certificates or other communications hereunder shall be deemed sufficiently given if (a) mailed by United States certified mail, return receipt requested, postage prepaid, or (b) if sent by a nationally recognized overnight courier, or (c) delivered personally, addressed as follows:

(a) To the Lessor:

Northwest Infrastructure Financing  
Corporation II  
c/o J.H. Management Corporation  
One International Place, Room 3218  
Boston, MA 02110-2916

or

Northwest Infrastructure Financing  
Corporation II  
c/o J.H. Management Corporation  
P.O. Box 961500  
Boston, MA 02196-1500

(b) To the Lessee:

For overnight courier or personal delivery:

Manager, Capital and Risk Management  
Bonneville Power Administration  
905 NE 11<sup>th</sup> Avenue – KFW-2  
Portland, Oregon 97208

For United State mail:

P.O. Box 3621  
FTC-2  
Portland, Oregon 97208

In all cases, with a copy to:

Project Manager  
P.O. Box 61409  
8100 NE Parkway Drive, Suite 50  
Vancouver, WA 98666, 1409

The Lessor and the Lessee may, by notice given hereunder to each of the others, designate any further or different addresses to which subsequent notices, certificates or other communications to them shall be sent.

Any notice, certificate or other communication hereunder shall, except as may expressly be provided herein, be deemed to have been given or served two (2) days after the date the same shall be deposited in the United States mails, postage prepaid, in the manner aforesaid or one (1) day after the date that the same shall be deposited with a nationally recognized overnight courier or on the date of delivery or refusal thereof, if delivered personally.

Section 8.5 Severability. If any clause, provision or Section of this Agreement be ruled invalid by any court of competent jurisdiction, the invalidity of such clause, provision or Section shall not affect any of the remaining provisions hereof.

Section 8.6 Inspection of Project.

(a) Upon reasonable notice, the Lessee shall permit the Lessor and its respective agents or representatives to inspect each Project at all reasonable times during business days and business hours for the purpose of determining whether or not the Lessee is in compliance with its obligations hereunder. The Lessor shall have no duty to inspect any Project.

(b) In no event shall the Lessor or its agents, employees, contractors, other invitees or assignees (including the lender) be entitled to access to the areas surrounding the location of any portion of any Project that the Lessee has designated a confidential area unless and until the entity and individual persons seeking access have signed and delivered to a representative of the Lessee at such Project an agreement of confidentiality and nondisclosure in the form and substance reasonably satisfactory to the Lessee. In addition, the Lessee's consent in this Agreement to authorized access is for the limited purpose described in paragraph (a) above and is not intended as a waiver of any rights granted by law to challenge a request or demand by anyone to access a Project for the purpose of an inspection or search.

(c) Nothing in this Section 8.6 or elsewhere in this Agreement shall imply any duty on the part of the Lessor to do any work, and performance thereof by the Lessor shall not constitute a waiver of the Lessee's default in failing to perform the same.

Section 8.7 Effective Date; Counterparts. This Agreement shall become effective upon its execution and delivery. It may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

Section 8.8 Binding Effect. This Agreement shall inure to the benefit of, and shall be binding upon, the Lessor and the Lessee and their respective successors and assigns.

Section 8.9 Net Lease. It is the intention of the parties hereto that this Agreement be a "triple net lease" and this Agreement shall be construed to effect such intent.

Section 8.10 Law Governing. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without reference to choice of law doctrine, except that to the extent the parties' rights and obligations are required to be governed by United

States Federal law, then such rights and obligations shall be governed by United States Federal law.

Section 8.11 Limited Recourse. No recourse under any obligation, covenant or agreement of the Lessor contained in this Agreement shall be had against J. H. Management Corporation ("JHM") or any incorporator, stockholder, officer, director or employee of the Lessor or JHM, by the enforcement of any assessment or by any legal or equitable proceeding, by virtue of any statute or otherwise; it being expressly agreed and understood that this Agreement is solely a corporate obligation of the Lessor, and that no personal liability whatever shall attach to or be incurred by the incorporators, stockholders, officers, directors or employees of the Lessor or JHM, or any of them under or by reason of any of the obligations, covenants or agreements of the Lessor contained in this Agreement, or implied therefrom, and that any and all personal liability for breaches by the Lessor of any of such obligations, covenants or agreements either at common law or at equity, or by statute or constitution, of JHM and every such incorporator, stockholder, officer, director or employee is hereby expressly waived as a condition of and in consideration for the execution of this Agreement; provided, however, that nothing in this Section 8.11 shall relieve any of the foregoing persons or entities from any liability arising from his, her or its willful misconduct or intentional misrepresentation.

Section 8.12 Information Security. It is possible that information that is provided to the Lessor by the Lessee or that comes into the possession of the Lessor as a result of its ownership of each Project during the performance of this Agreement, may contain critical and sensitive information about such Project. "Project Information" means information about each Project that is so designated at any time by the Lessee in writing to the Lessor.

The Lessee hereby designates the following information as Project Information:

- Information describing the precise location (survey coordinates) of each Project;
- Information relating to the design, operation, maintenance or construction of each Project;
- Information describing schedules for the design, operation, maintenance or construction of each Project, and
- Information describing engineering or security vulnerabilities.

Project Information excludes any of the foregoing information if it has otherwise been made available to the public by the Lessee or with the Lessee's consent.

The Lessor may disseminate Project Information among its officers, employees, attorneys, contractors, and other agents only as may be necessary in the performance of this Agreement. The Lessor shall ensure that Project Information is not distributed, shared, or otherwise made accessible to others not involved in the performance of this Agreement other than with the prior consent of the Lessee or pursuant to a valid final order or direction by a judicial, regulatory, administrative or other governmental body having jurisdiction thereof. If the Lessor is requested to disclose any Project Information pursuant to a judicial, regulatory, administrative or other governmental process, the Lessor shall immediately notify the Lessee. The Lessee may thereupon defend against disclosure at the Lessee's expense. The Lessor will

assist the Lessee in any such defense.

Section 8.13 Broker. Each of the parties represents to the other that it has not dealt with any broker in connection with this transaction. If any claim is made by any broker who shall claim to have acted or dealt with the Lessee or the Lessor in connection with this transaction, the Lessee or the Lessor, as the case may be, will be responsible for payment of the brokerage commission, fee or other compensation to which such broker is entitled.

Section 8.14 Entire Agreement. This Agreement contains all the promises, agreements, conditions, inducements and understandings between the Lessor and the Lessee relating to each Project (other than the Construction Agency Agreement) and there are no promises, agreements, conditions, understandings, inducements, warranties or representations, oral or written, expressed or implied, between them other than as herein set forth.

Section 8.15 Date of Agreement for Reference Purposes Only. The date of this Agreement shall be for reference purposes only and shall not be construed to imply that this Agreement was executed on the date first above written.

IN WITNESS WHEREOF, each party hereto has caused this Agreement to be executed in its name and on its behalf by its duly authorized officer.

NORTHWEST INFRASTRUCTURE  
FINANCING CORPORATION II,  
as Lessor

By: \_\_\_\_\_  
Name: R. Douglas Donaldson  
Title: Treasurer  
Date: \_\_\_\_\_, 2007

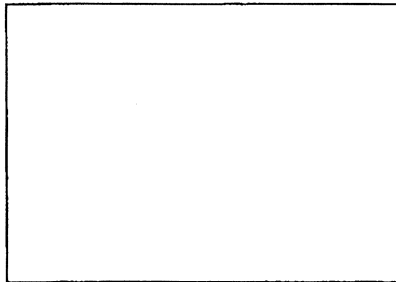
UNITED STATES OF AMERICA  
DEPARTMENT OF ENERGY acting by and  
through the Administrator of the Bonneville  
Power Administration,  
as Lessee

By: \_\_\_\_\_  
Name: Stephen J. Wright  
Title: Administrator and Chief  
Executive Officer  
Date: \_\_\_\_\_, 2007

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

I certify that I know or have satisfactory evidence that \_\_\_\_\_ is the person who appeared before me, and said person acknowledged that said person signed this Lease Agreement, on oath stated that said person was authorized to execute the instrument and acknowledged it as the \_\_\_\_\_ of \_\_\_\_\_ to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: \_\_\_\_\_.



(Use this space for notarial stamp/seal)

\_\_\_\_\_  
Notary Public

Print Name: \_\_\_\_\_

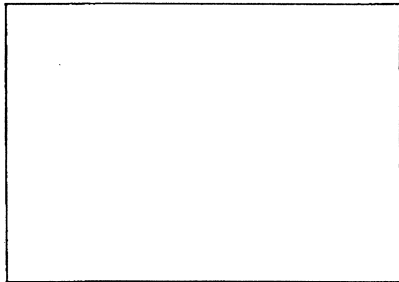
Notary public in and for the state of \_\_\_\_\_, residing at \_\_\_\_\_.

My commission expires: \_\_\_\_\_.

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

I certify that I know or have satisfactory evidence that \_\_\_\_\_ is the person who appeared before me, and said person acknowledged that said person signed this Lease Agreement, on oath stated that said person was authorized to execute the instrument and acknowledged it as the \_\_\_\_\_ of \_\_\_\_\_ to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: \_\_\_\_\_.



(Use this space for notarial stamp/seal)

\_\_\_\_\_  
Notary Public

Print Name: \_\_\_\_\_

Notary public in and for the state of \_\_\_\_\_, residing at \_\_\_\_\_.

My commission expires: \_\_\_\_\_.



## APPENDICES

DEFINITIONS

The following terms shall have the following meanings in this Agreement:

Agreement or Lease Agreement means the Master Lease Agreement dated as of [ ] 1, 2007 between the Lessor and the Lessee, and shall include any and all amendments thereof and supplements thereto and all Schedules thereto hereafter made in conformity herewith.

Authorized Representative means, (i) in the case of the Lessor, the President, Vice President or Treasurer thereof, or any officer or employee of the Lessor authorized to perform specific acts or to discharge specific duties, (ii) in the case of the Lessee, those officers or employees authorized to act pursuant to letters of authority issued from time to time by the Administrator of the Lessee and delivered to the Lessor and (iii) in the case of the Construction Agent, those officers or employees authorized to act pursuant to letters of authority issued from time to time by the Administrator of the Construction Agent and delivered to the Lessor.

Bonneville Fund shall mean the fund established in the Treasury of the United States pursuant to 16 U.S.C. § 838i(a), as amended from time to time; the amounts in such fund are available for expenditure by the Lessee.

Business Day means a day (a) other than a day on which banks located in The City of New York, New York or the cities in which the principal offices of the Custodian, the Lessee or the Lessor are located are required or authorized by law or executive order to close and (b) on which the New York Stock Exchange is not closed.

Construction Agency Agreement means the Construction Agency Agreement, dated as of [ ] 1, 2007, between the Lessor and the Construction Agent.

Construction Agent means the United States of America, Department of Energy, acting by and through the Administration of the Bonneville Power Administration, acting pursuant to the Construction Agency Agreement.

Costs of Construction means all costs related to acquiring, installing and/or and/or constructing each Project to completion, operation and/or energization, which costs shall include but shall not be limited to (i) all costs of environmental review, engineering and architectural services with respect to such Project, including the cost of design, test borings, surveys, estimates, plans and specifications and for supervising construction, as well as for the performance of all other duties required by or consequent upon the proper installation and/or construction of, and the making of alterations, renovations, additions and improvements in connection with, the completion, operation and/or energization of such Project; (ii) all costs paid or incurred for labor, materials, services, supplies, machinery, equipment and other expenses and to construction managers, contractors, suppliers, builders and materialmen in connection with the

acquisition, installation and/or construction of such Project; and (iii) all Costs of Construction, Delay, Suspension or Termination.

Costs of Construction Delay, Suspension or Termination means (i) all costs of environmental review, engineering and architectural services with respect to any Project, including the cost of design, test borings, surveys, estimates, plans and specifications and for supervising construction, as well as for the performance of all other duties required by or consequent upon the proper installation and/or construction of, and the making of alterations, renovations, additions and improvements in connection with, the delay, suspension or termination of such Project; (ii) all costs paid or incurred for labor, materials, services, supplies, machinery, equipment and other expenses and to construction managers, contractors, suppliers, builders and materialmen in connection with the delay, suspension or termination of such Project; and (iii) all costs which are required to be paid, under the terms of any contract or contracts, for the delay, suspension or termination of a Project.

Credit Agreement means the Credit Agreement dated [ ] 1, 2007 between Northwest Infrastructure Financing Corporation II and Citigroup Inc. and all amendments and supplements thereto.

Custodial Agreement means the Custodial and Security Agreement dated [ ], 2007 among the Custodian, the Lessor, the Construction Agent and Citibank, N.A. and all amendments and supplements thereto.

Custodian means [ ], or such other custodian identified by the Lessor and acceptable to the Lessee, which executes a Custodial Agreement.

Debt means, the sum of the following (without duplication): (i) all obligations for borrowed money or evidenced by bonds, debentures, notes or other similar instruments (including principal, interest, fees and charges); (ii) all obligations (whether contingent or otherwise) in respect of bankers' acceptances, letters of credit, surety or other bonds and similar instruments; (iii) all obligations to pay the deferred purchase price of property or services (other than for borrowed money); (iv) all obligations under leases which shall have been, or should have been, in accordance with generally accepted accounting principles, recorded as capital leases (whether contingent or otherwise); (v) all obligations under operating leases that require that rental payments be made over the term of such lease, based on the purchase price or appraised value of the property subject to such lease plus a marginal interest rate, and used primarily as a financing vehicle for, or to monetize, such property; (vi) all Debt (as described in the other clauses of this definition) and other obligations of others secured by a Lien on any asset of the Lessee, whether or not such Debt is assumed by the Lessee; (vii) all Debt (as described in the other clauses of this definition) of others guaranteed by the Lessee or in which the Lessee otherwise assures a creditor against loss of the debtor or obligations of others; (viii) all obligations or undertakings to maintain or cause to be maintained the financial position or covenants of others or to purchase the Debt or property of others; (ix) obligations to deliver goods or services not in the ordinary course of business in consideration of advance payments; and (x) obligations to pay for goods or services not in the ordinary course of business whether or not such goods or services are actually received: *provided, however*, that, "Debt" shall not include any payment responsibilities of the Lessee (A) with respect to bonds, notes or other

evidences of indebtedness issued and sold by the Lessee to the United States Treasury, (B) to the credit of the reclamation fund or other funds as are required by or pursuant to law to be made into such funds in connection with reclamation projects in the Pacific Northwest, (C) to the credit of miscellaneous receipts of the United States Treasury for all unpaid costs required by or pursuant to law to be charged to and returned to the general fund of the United States Treasury for the repayment of the Federal investment in the Federal Columbia River Power System, or (D) to or on account of any other fund or account within the United States Treasury, *provided*, in each case, that the United States Treasury (or such other obligee in respect of such Debt) has not declared such Debt to be due and payable prior to its stated maturity or otherwise sought to enforce payment (through legal proceedings, negotiations or otherwise) of such Debt.

Event of Default under the Lease Agreement shall have the meaning specified in Section 6.1 of the Lease Agreement.

Federal Appropriations Obligation means the appropriated investment in the Federal Columbia River Power System or any bond or other evidence of indebtedness issued by the Lessee to investors other than the United States Treasury and payable from the Bonneville Fund, the proceeds of which pay or prepay such investment.

Fiscal Year of the Lessee or Fiscal Year means a year of 365 or 366 days, as the case may be, commencing on October 1 and ending on September 30 or such other year of similar length as to which the Lessee shall have given prior written notice thereof to the Lessor at least sixty (60) days prior to the commencement thereof.

Impositions has the meaning specified in Section 3.6.

Indemnified Parties means the Lessor.

Legal Requirements shall have the meaning set forth for such term in Section 3.7 of the Lease Agreement.

Lessee means the United States of America Department of Energy acting by and through the Administrator of the Bonneville Power Administration.

Lessor means the Northwest Infrastructure Financing Corp. II, a Delaware corporation.

Lien has the meaning specified in Section 5.3.

Loan Fund means the Loan Fund established and created pursuant to the Custodial Agreement.

Loss Event has the meaning specified in Section 4.1(a).

Opinion of Counsel means a written opinion of counsel who may (except as otherwise expressly provided in the Lease Agreement) be counsel for the Lessee or the Lessor.

Permitted Encumbrances means, as of any particular time,

- (i) this Agreement;
- (ii) liens for real estate taxes, assessments, levies and other governmental charges and other Impositions not yet payable, or payable without the addition of any fine, penalty, interest or cost for non-payment;
- (iii) utility, access and other easements and rights-of-way, restrictions and exceptions that an Authorized Representative of the Lessee certifies to the Lessor will not interfere with or impair the Lessee's use of a Project as provided in the Lease Agreement;
- (iv) such minor defects, irregularities, encumbrances, easements, rights-of-way (including agreements with any railroad the purpose of which is to service a railroad siding) and clouds on title as normally exist with respect to property similar in character to a Project and as do not, either singly or in the aggregate, materially impair the value or use of the property affected thereby for the purpose for which it was acquired and held by the Lessor under the Lease Agreement;
- (v) any mechanics', workmen's, repairmen's, materialmen's, contractors', warehousemen's, carriers', suppliers' or vendors' lien or right in respect thereof if payment is not yet due and payable, all if and to the extent permitted by Section 5.3;
- (vi) any mortgage, lien, security interest or other encumbrance which exists in favor of the Lessor or to which the Lessor shall consent; and
- (vii) so long as no Event of Default has occurred and is continuing hereunder, any Lien being contested by the Lessee at its sole expense by appropriate action conducted in good faith and with due diligence.

Person means any individual, corporation, partnership, joint venture, association, joint stock company, limited liability company, trust, unincorporated organization or government, any agency or political subdivision thereof or any other entity.

Project means each Project described in a Schedule to the Lease Agreement, as amended as provided in Section 3.5.

Project Costs means all Costs of Construction.

Project Fund means the Loan Fund established and created pursuant to the Custodial Agreement.

Reserve Fund means the Reserve Fund established and created pursuant to the Custodial Agreement.

Reserved Rights means, collectively,

- (i) the right of the Lessor in its own behalf to receive all Opinions of Counsel, reports, financial statements, certificates, insurance policies, binders or certificates, or

other notices or communications required to be delivered to the Lessor under the Lease Agreement;

(ii) the right of the Lessor to grant or withhold any consents or approvals required of the Lessor under the Lease Agreement;

(iii) the right of the Lessor in its own behalf (or on behalf of the appropriate taxing authorities) to enforce, receive amounts payable under, or otherwise exercise its rights under Sections 2.3(b), 3.6, 3.7 and 5.1; and

(iv) the right of the Lessor in its own behalf to declare an Event of Default under Section 6.1 of the Lease Agreement with respect to any of the Lessor's Reserved Rights.

Special BPA Event means the occurrence of any of the following events: (i) the Lessee's obligation to make payments with respect to (A) Federal Appropriations Obligation shall, for any reason, become payable prior to the Lessee's obligations hereunder or (B) Treasury Payments shall, for any reason, become payable prior to or on a parity with the Lessee's obligations hereunder or (ii) any change in the organization, structure, powers or authority of the Lessee occurs which terminates, suspends, or limits the Lessee's authority to (A) borrow from the United States Treasury or (B) defer Treasury Payments in order to pay costs other than such payments to the United States Treasury, but in the case of the events described in clause (ii)(A), only if such suspension or limitation materially adversely affects the Lessee's ability to make payments other than payments to the United States Treasury.

Treasury Payments means the Lessee's payments to the United States Treasury for purposes other than those on account of the Federal Appropriations Obligation.

**PROVISIONS REQUIRED BY STATUTE OR  
EXECUTIVE ORDER**

**1. CONTRACT WORK HOURS AND SAFETY STANDARDS**

This contract, if and to the extent required by applicable law and if not otherwise exempted, is subject to the following provisions:

**(a) Overtime Requirements**

No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics, shall require or permit any laborer or mechanic in any workweek in which such worker is employed on such work to work in excess of eight (8) hours in any calendar day or in excess of 40 hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times such worker's basic rate of pay for all hours worked in excess of eight (8) hours in any calendar day or in excess of forty (40) hours in such workweek, as the case may be.

**(b) Violation, Liability for Unpaid Wages; Liquidated Damages**

In the event of any violation of the provisions of subsection (a), the contractor and any subcontractor responsible therefor shall be liable to any affected employee for such employee's unpaid wages. In addition, such contractor and subcontractor shall be liable to the Government for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provisions of subsection (a) in the sum of \$10 for each calendar day on which such employee was required or permitted to be employed in such work in excess of eight (8) hours or in excess of such employee's standard workweek of forty (40) hours without payment of the overtime wages required by subsection (a) above.

**(c) Withholding for Unpaid Wages and Liquidated Damages**

Bonneville may withhold, or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in subsection (b) above.

**(d) Subcontracts**

The contractor shall insert in any subcontracts the clauses set forth in subsections (a) through (c) of this provision and also a clause requiring the subcontractors to included these clauses in any lower tier subcontracts which they may enter into, together with a clause requiring this insertion in any further subcontracts that may in turn be made.

(e) **Records**

The contractor shall maintain payroll records containing the information specified in 29 CFR 516.2(a). Such records shall be preserved for three (3) years from the completion of the contract.

**2. CONVICT LABOR**

In connection with the performance of work under this contract, the contractor agrees, if and to the extent required by law and if not otherwise exempted, not to employ any person undergoing sentence of imprisonment except as provided by Public Law 89-176, September 10, 1965 (18 U.S.C. 4082(c)(2)) and Executive Order 11755, December 19, 1973.

**3. EQUAL OPPORTUNITY**

During the performance of this contract, if and to the extent required by applicable law and if not otherwise exempted, the contractor agrees as follows:

- (a) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation and selection for training, including apprenticeships. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by Bonneville setting forth the provisions of the Equal Opportunity clause.
- (b) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applications will receive consideration for employment without regard to race, color, religion, sex, or national origin.
- (c) The contractor will send to each labor union or representative or workers with which said contractor has a collective bargaining agreement or other contract or understanding, a notice, to be provided by Bonneville, advising the labor union or worker's representative of the contractor's commitments under the Equal Opportunity clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- (d) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
- (e) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to said contractor's books, records, and accounts by Bonneville and the Secretary of



Labor for purposes of investigations to ascertain compliance with such rules, regulations, and orders.

- (f) In the event of the contractor's non-compliance with the Equal Opportunity clause of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with the procedures authorized in Executive Order 11246 or September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
- (g) The contractor will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as Bonneville may direct as a means of enforcing such provisions including sanctions for noncompliance. In the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by Bonneville, the contractor may request the Government to enter into such litigation to protect the interests of the Government.

#### **4 INTEREST OF MEMBER OF CONGRESS**

No Member of or Delegate to Congress, or Resident Commissioner shall be admitted to any share of part of this contract or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to such contract if made with a corporation for its general benefit.

#### **5. ADDITIONAL PROVISIONS**

The contractor agrees to comply with the clauses for Government contracts contained in the following statutes, Executive Orders, and regulations to the extent applicable:

- (a) the Rehabilitation Act of 1973, Public Law 93-112, as amended, and 41 CFR 60-741 (affirmative action for handicapped workers);
- (b) the Vietnam Era Veterans Readjustment Assistance Act of 1974, Public Law 92540, as amended, and 41 CFR 60-250 (affirmative action for disable veterans and veterans of the Vietnam era);
- (c) the Davis-Bacon Act, 40 U.S.C. 27b et seq., and 29 CFR 5 (required wage rates for public buildings and works);
- (d) Executive Order 11625 and 41 CFR 1-1.1310-2 (utilization of minority business enterprises);
- (e) Certification of Nonsegregated Facilities , 41 CFR 1-12.803-10.

### FORM OF SCHEDULE

1. [Insert Project Description, including a description of the project components]
2. Effective Date of Lease Term for this Project:
2. Expected Project Completion Date: \_\_\_\_\_, 20\_\_.
3. Rental Payment Schedule:

Date	Amount
	\$

Upon the occurrence and continuance of an Event of Default under the Agreement, each rental payment shall be increased by \_\_\_\_%.

4. Percentage of each rental payment allocable to each Project component.

<u>Project Component</u>	<u>Percentage</u>
	%

5. The representations and warranties contained in Section 1.1 of the Agreement are true and correct on the date hereof as if made on the date hereof.

6. The Lessee has obtained all approvals required to be obtained by it relating to the execution and delivery of this Schedule and the leasing of the Project described in paragraph 1 above.

7. No additional action is required to be taken by FERC or any state local public utility commission to insure that the Lessor is not subject to any federal, state or local laws, rules and regulations applicable to a public utility.

UNITED STATES OF AMERICA  
DEPARTMENT OF ENERGY acting by and  
through the Administrator of the Bonneville  
Power Administration,  
as Lessee

By: \_\_\_\_\_  
Name:  
Title:

ACCEPTED AND AGREED:

NORTHWEST INFRASTRUCTURE  
FINANCING CORPORATION II,  
as Lessor

By: \_\_\_\_\_

Name:

Title:

**RENTAL PAYMENT LEDGER**  
**(for administrative purposes)**

Date	Total Lease Payments Due
------	--------------------------

\$

\$

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## **EXHIBIT B**

**FERC Order Granting Petition for Declaratory  
Order Disclaiming Jurisdiction**

118 FERC ¶ 61,240  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellingshoff.

U.S. Department of Energy  
Bonneville Power Administration

Docket No. EL07-36-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER  
DISCLAIMING JURISDICTION

(Issued March 23, 2007)

1. On February 14, 2007, Bonneville Power Administration (BPA) filed a petition for a declaratory order disclaiming Commission jurisdiction pursuant to section 201 of the Federal Power Act (FPA), 16 U.S.C. § 824 (2000), over the owner lessor (Owner Lessor) in a proposed sale and leaseback transaction. BPA states that the Owner Lessor: (1) will not operate or control the operation of the facility at issue, and (2) will not be otherwise engaged in the business of producing, selling, or transmitting electric energy.

2. In this order, we find that the Owner Lessor, as contemplated in the proposed sale/leaseback arrangement, will be a passive investor that will not exercise control or decision-making authority over the leased facilities at issue, and will not otherwise be engaged in the business of selling or transmitting electric energy. Accordingly, the Owner Lessor, to the extent that it operates in a manner consistent with the representations in BPA's application, will not be a public utility within the meaning of section 201(e) of the FPA by virtue of the proposed sale/leaseback transaction.

**Background**

3. BPA proposes to construct certain electric transmission facilities, as yet undetermined, primarily ranging from 69 kV to 1000 kV, to be located in the states of Washington, Oregon, Idaho, California, Wyoming, Nevada, and Montana (the Facilities). According to BPA, the Facilities will be owned by Northwest Infrastructure Financing Corporation (Owner Lessor), a special purpose entity formed expressly for the purpose of arranging for the acquisition and financing of the transaction. BPA states that all of the



stock of the Owner Lessor will be owned by J H Holdings acting solely in its capacity as trustee under a trust agreement between J.H. Management Corporation and J H Holdings Corporation.<sup>1</sup>

4. BPA states that the Owner Lessor will finance the acquisition and construction of the Facilities through one or more bank loans (the Loans), and will use lease payments made by BPA to the Owner Lessor under a master lease agreement to repay the Loans. BPA asserts that at or before the time the first advance under the Loans is requested, the Owner Lessor and BPA will execute a seven-year master lease agreement under which the Owner Lessor will lease its undivided interest in each Facility to BPA as each Facility is acquired, installed and/or constructed, and pursuant to which BPA will acquire possession of each Facility. BPA further states that it will agree in the master lease agreement that it will operate and maintain the Facilities in the same manner as it operates and maintains its other transmission facilities.

5. BPA states that the Owner Lessor will have no operating responsibilities or control rights with respect to the Facilities, nor is the Owner Lessor or its affiliates engaged in the business of producing, selling, or transmitting electric energy. BPA asserts that, accordingly, the Owner Lessor should not be considered a “public utility,” as defined under section 201(e) of the FPA.

6. The master lease agreement also has provisions dealing with defaults and expiration of the lease. According to BPA, under certain circumstances, the Owner Lessor may take possession of the Facilities upon the occurrence of certain events of default by BPA.<sup>2</sup> BPA asserts that, previously, the Commission had not considered such default provisions to be a present assignment of rights for purposes of section 201 jurisdiction.

7. At the end of each Facility’s lease term, BPA may either: (1) purchase the Facility, (2) renew the Facility lease for a term of one or more years for a nominal annual rental payment, or (3) remove the Facility from the Facility site at its own expense.<sup>3</sup> BPA

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<sup>1</sup> All of the capital stock of these two entities is owned by The 1960 Trust, an independent charitable support organization which is operated for the benefit of Harvard University.

<sup>2</sup> The specific events of default and the rights the passive participants may exercise if default occurs are described in Article 6 of the master lease agreement.

<sup>3</sup> The specific options at the end of the Facility lease are described in Article 7 of the master lease agreement.

states that, upon expiration of the Facility lease term, the Owner Lessor would have its interests in the Facility terminated in the event BPA purchases or removes the Facility, or retain its passive interest in the event BPA renews the Facility lease.

### **Notice Of Filing**

8. Notice of BPA's filing was published in the *Federal Register*, 72 Fed. Reg. 10,193 (2007), with protests and interventions due on or before March 5, 2007. On March 9, 2007, NorthWestern Corporation (NorthWestern) filed a motion to intervene out-of-time and a request for a technical conference. NorthWestern states that it does not oppose BPA's petition, but it would like to understand more fully: (1) how the proposed facilities impact the regional transmission grid, BPA's rates, and NorthWestern's customers; and (2) the identity of the Owner Lessor and any other transmission facilities it may own.

### **Discussion**

9. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2006), the Commission will grant NorthWestern's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

10. BPA seeks a disclaimer of jurisdiction over the Owner Lessor of the Facilities, *i.e.*, a determination that the Owner Lessor will not be regarded as a public utility as defined in section 201 of the FPA.

11. Section 201(b)(1)<sup>4</sup> of the FPA states in pertinent part:

The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce. . . . The Commission shall have jurisdiction over all facilities used for such transmission or sale of electric energy. . . .

Section 201(e)<sup>5</sup> states that "[t]he term 'public utility' . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission. . . ."

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<sup>4</sup> 16 U.S.C. § 824(b)(1) (2000).

<sup>5</sup> 16 U.S.C. § 824(e) (2000).

12. The application of section 201 of the FPA to entities with a passive interest in jurisdictional facilities has been addressed by the Commission on numerous occasions.<sup>6</sup> The Commission employs a two-step analysis for determining whether a financial interest in jurisdictional facilities constitutes sufficient ownership that holding such interests would result in a finding of “public utility” status under the FPA. Under this precedent, the Commission first determines whether the passive participant will operate the facilities. The Commission then determines whether the passive participant is otherwise in the business of selling or transmitting electric energy. The Commission has concluded that it would be inconsistent with the FPA to label the passive participants in certain financial arrangements as public utilities, and subject them to the Commission’s jurisdiction, where these participants hold only equitable or legal title to the facilities, and are removed from the operation of the facilities and the sale or transmission of electric energy.

13. In the instant case, BPA states that the Owner Lessor: (1) will have no operating responsibilities or control rights with respect to the facilities at issue and (2) will not be an entity otherwise engaged in the business of producing, selling, or transmitting electric energy. In light of the facts presented in the petition and consistent with Commission precedent, we find that the Owner Lessor, as contemplated in the proposed lease financing arrangement, will be a passive investor that does not exercise control or decision-making authority over the leased facilities, and is not otherwise in the business of selling or transmitting electric energy. Accordingly, we will disclaim jurisdiction over the Owner Lessor, as requested by BPA.<sup>7</sup>

14. As to the default provision, BPA argues that this provision does not represent a present assignment of rights and, therefore, should not subject the Owner Lessor to jurisdiction under section 201 of the FPA. We agree that the lease provisions, as

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<sup>6</sup> See, e.g., *Pacific Power & Light Co.*, 3 FERC ¶ 61,119 (1978); *El Paso Electric Co.*, 36 FERC ¶ 61,055 (1986); *City of Vidalia, Louisiana*, 52 FERC ¶ 61,199 (1990); *Oglethorpe Power Corp.*, 77 FERC ¶ 61,334 (1996); *U.S. Dep’t of Energy-Bonneville Power Admin.*, 106 FERC ¶ 61,076 (2004)

<sup>7</sup> If the facts change so that the passive participant operates the facilities in order to make sales of electric energy at wholesale or to engage in transmission of electric energy in interstate commerce, it will become a public utility and will be required to make appropriate filings pursuant to section 205 of the FPA. 16 U.S.C. § 824d (2000). See, e.g., *Unicom Investments, Inc.*, 91 FERC ¶ 61,109 at 61,387, n.9 (2000).

presented in the petition, are not a present assignment of rights to the Owner Lessor that would subject it to jurisdiction under section 201 of the FPA.<sup>8</sup>

15. With respect to NorthWestern's request for a technical conference, we do not find this to be an appropriate proceeding in which to schedule a technical conference to respond to NorthWestern's questions and thus, we deny the request.

The Commission orders:

BPA's request that the Commission disclaim jurisdiction over the Owner Lessor in this proceeding, based on the facts presented by BPA in its petition, is hereby granted.

By the Commission.

( S E A L )

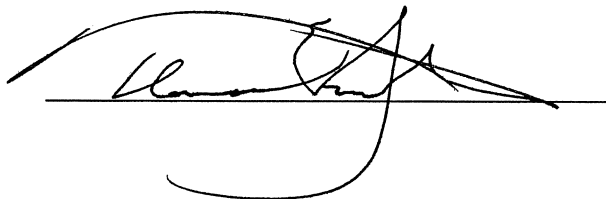
Philis J. Posey,  
Acting Secretary.

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<sup>8</sup> See, e.g., *Wisconsin Energy Corp.*, 105 FERC ¶ 61,029 at P 14 (2003); *PPL Large Scale Distributed Generation II, LLC*, 96 FERC ¶ 61,239 at 61,956 (2001); *Dynegy Danskammer, LLC*, 94 FERC ¶ 61,136 at 62,189 (2001).

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached PETITION OF BONNEVILLE POWER ADMINISTRATION FOR DECLARATORY ORDER DISCLAIMING JURISDICTION has today been served on all parties entitled to receive the same, by sending the original and required copies to the Montana Public Service Commission by Federal Express overnight mail at the address of Kate Whitney, Montana Public Service Commission, 1704 Prospect Avenue, Helena, Montana 59620-2601, and by mailing a copy thereof to Robert Nelson, Montana Consumer Counsel, P. O. Box 201703, Helena, Montana 59620-1703, by first class mail, postage prepaid, this 29<sup>th</sup> day of March, 2007.

A handwritten signature in black ink, appearing to read "Robert Nelson", is written over a horizontal line. The signature is stylized with a large, sweeping initial 'R' and a long, curved tail that extends below the line.